would deprive the courts of the privilege of regarding, as the controlling factor in the case, the fact that the defendant relied in good faith upon the overruled decision.[15]

When there is no moral turpitude in the alleged offense, the waiver of the general rule does not outrage public justice. On the other hand, no case has been found in which the general rule has been waived when the offense charged was *malum in se*. A defendant charged with the commission of such an offense cannot complain of the retroactive operation of a judicial decision, for no one has a vested right in the opinion of a court.[16]

The departures from the general rule are not made in protest against our traditional views, but to prevent the hardships which must necessarily follow as the result of a too logical operation of any rule of human conduct. *I. A. C.*

DIVORCE: EFFECT OF INTERLOCUTORY JUDGMENT ON PROPERTY RIGHTS—Prior to the introduction of the interlocutory judgment into California divorce procedure, the property rights of the parties to an action in divorce were determined, and the marriage relation was dissolved, by a single judgment.[1] With the advent of the interlocutory judgment, provided for in 1903 by amendment of the Civil Code,[2] the question at once arose whether the property rights of the parties could be finally adjudicated by this judgment, or whether their ultimate disposition must await the final judgment. Upon this question the legislature had not desired, apparently, to throw any light. And in view of the obvious uncertainty of the relevant code provisions, it is not surprising that the courts, in their efforts to clarify the situation, for a time at least seemed rather to increase than to lessen the confusion.[3]

The purpose of the provision creating the interlocutory judgment was, of course, to prevent either party to a divorce action from entering into another marriage for a period of one year from the entry of such judgment. Except in so far as was necessary to accomplish this object, it was not the intent of the statute to

691. The exception was followed in State v. Bell (1904) 136 N. C. 674, 49 S. E. 163; State v. Longino (1915) 109 Miss. 125, 67 So. 902, Ann. Cas. 1916E, 371.

[15] Supra, n. 14.

[16] Supra, n. 6.

[1] Grannis v. Superior Court (1905) 146 Cal. 245, 79 Pac. 891, 106 Am. St. Rep. 23.

[2] Cal. Civ. Code § 131, ". . . . If it (the court) determines that the divorce ought to be granted, an interlocutory judgment must be entered, declaring that the party in whose favor the court decides is entitled to a divorce . . . ."; Cal. Civ. Code, § 132, "When one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting the divorce, and such judgment shall restore them to the status of single persons . . . ."; Cal. Civ. Code, § 61, ". . . . In no case can a marriage of either of the parties during the life of the other be valid in this state, if contracted within one year after the entry of an interlocutory decree in a proceeding for divorce."

[3] Pereira v. Pereira (1909) 156 Cal. 1, 103 Pac. 488, 134 Am. St. Rep. 107, 23 L. R. A. (N. S.) 880; Estate of Dargie (1912) 162 Cal. 51, 121 Pac. 320; Brown v. Brown (1915) 170 Cal. 1, 147 Pac. 1168.

change in any respect the practice and procedure in actions for divorce.[4] The statute does not of itself declare the marriage dissolved at the expiration of the year from the interlocutory judgment, but merely suspends for one year the power of the court to dissolve it. It is the final judgment alone that grants the divorce, dissolves the marriage, and restores the parties to the status of single persons.[5]

Since the Code provides for disposition of the community property of the parties only "in case of the dissolution of the marriage,"[6] and by an order made by the court "in rendering a decree of divorce,"[7] it might appear that the court's power to determine issues as to property rights exists only at the time when the final judgment of divorce is awarded. Yet it is settled that the court has power at least to take cognizance of these issues at the time of the trial of the issues as to divorce.[8] In *Gould v. Superior Court*[9] the interlocutory judgment purported to confirm and provide for the performance of an agreement made by the husband and wife in open court dividing the community property between them. Within a month from its entry the husband died. The court held that under section 473 of the Code of Civil Procedure it became final and conclusive at the expiration of six months from its entry. One year after the entry of this interlocutory judgment, on the court's own motion, the final decree of divorce was entered. The jurisdiction of the court to make this decree was attacked. In Gloyd v. Superior Court,[10] where the interlocutory judgment did not purport to adjudicate property rights of any character, it was held that, upon death of one of the parties during the ensuing year, the court lost jurisdiction to proceed further in the case because the death extinguished the pre-existing marriage status which formed the subject matter of the action, leaving nothing upon which a final decree could be made to operate. In the Gould case the jurisdiction of the court to enter the final decree was upheld, since the property rights confirmed in the interlocutory judgment remained in existence despite the death. But if the adjudication of property rights became final six months from the entry of the interlocutory decree,

[4] Grannis v. Superior Court, supra, n. 1; Pereira v. Pereira, supra, n. 3.

[5] Estate of Dargie, supra, n. 3; In re Seiler's Estate (1912) 164 Cal. 181, 128 Pac. 334, Ann. Cas. 1914B, 1093, Pereira v. Pereira, supra, n. 3; Estate of Walker (1915) 169 Cal. 400, 146 Pac. 868; Brown v. Brown, supra, n. 3; Olson v. Superior Court (1917) 175 Cal. 250, 165 Pac. 706, 1 A. L. R. 1589; London Guaranty & Accident Co. v. Industrial Accident Commission (1919) 58 Cal. Dec. 393, 184 Pac. 864.

[6] Cal. Civ. Code, § 146.

[7] Cal. Civ. Code, § 147. See also Cal. Civ. Code, § 90, "Marriage is dissolved only . . . . by the judgment of a court of competent jurisdiction decreeing a divorce of the parties."

[8] John v. Superior Court (1907) 5 Cal. App. 262, 90 Pac. 51; Pereira v. Pereira, supra, n. 3.

[9] (Apr. 22, 1920) 32 Cal. App. Dec. 15, (June 21, 1920) 60 Cal. Dec. 5, 191 Pac. 56.

[10] (Oct. 30, 1919) 30 Cal. App. Dec. 344, (Nov. 28, 1919) 30 Cal. App. Dec. 656, 185 Pac. 995.

here, as in the Gloyd case, there was nothing on which the final decree could be made to operate. "It would appear, on the one hand, that the entry of the final decree accomplished nothing; on the other, that it injured nobody."[11] Yet the legislature in enacting the last clause of section 132 of the Civil Code, which expressly provides that "the death of either party after the entry of the interlocutory judgment does not impair the power of the court to enter the final judgment", must have intended the final judgment to perform some useful function.

If the interlocutory judgment is considered a final adjudication of the property rights of the parties six months from its entry, the courts are confronted with a disconcerting interval before the entry of the final decree during which the parties remain in the legal relation of husband and wife. Proper construction of existing legislation will prevent many perplexing questions from arising.[12] Section 146 of the Civil Code providing for the distribution of community property "in case of the *dissolution* of the marriage" was enacted in 1873, having reference to the only decree then existing, which was final. It has been pointed out that the interlocutory judgment does not *dissolve* the marriage. And logically it would appear that the only function to be performed by a final decree after the death of a party is one relating to property rights. The District Court of Appeal in *Remley v. Remley*[13] has correctly interpreted the provisions of sections 131, 132, 146, and 147 of the Civil Code in its holding that the community property or homestead should not be disposed of or assigned until such time as the marriage is actually dissolved.

If this view is not concurred in by the Supreme Court, legislation clarifying the meaning of these sections appears desirable. If the Remley decision is followed, the procedure is simple. At the time of the trial of the issues as to the divorce, the court may try and determine the issues between the parties with respect to their property. But ultimate disposition must await the final

[11] Supra, n. 9.

[12] Suppose at the expiration of the first six months the husband dies. What would be the legal effect of the interlocutory judgment upon the property rights, if any, which vested in the wife on the death of the husband? Or suppose the interlocutory judgment disposes of the community property and the homestead, and before the time for entry of the final decree the parties become reconciled. In spite of the reconciliation and contrary to the intention of the parties, does the expiration of the six months prevent the property controlled by the judgment from again becoming community property? And what disposition, if any, would be made of the community property acquired after the interlocutory, but before the final judgment?

[13] (Oct. 6, 1920) 33 Cal. App. Dec. 304. This view is not in conflict with the statement, in Pereira v. Pereira, supra, n. 3, that "it is proper in all actions for divorce to try the entire action at the same time as the issues respecting divorce are tried and to give an interlocutory judgment declaring the rights of the parties with respect to property and children." The statement, in the reporter's syllabus of John v. Superior Court, supra, n. 8, that "the court had jurisdiction, and it was its duty, under section 131 of Civil Code, at the time of the having and granting of the interlocutory judgment . . . . , to include in the interlocutory judgment an assignment of the homestead," is not justified by the court's decision in the case.

judgment. In the meantime the court retains power to change this disposition so that substantial justice may be done to the parties no matter what the eventuality.[14] *R. H. M.*

FRAUD: RELIEF IN EQUITY AGAINST JUDGMENTS OBTAINED BY FRAUD—What is extrinsic fraud? The elusive character of the general rule that a court of equity will grant relief against fraud in a judgment only when such fraud is extrinsic is revealed when attempts are made to apply it in particular cases. The court in *Monk v. Morgan*[1] found extrinsic fraud in the fact that the administrator of an estate, intending to prevent certain heirs from hearing of the decedent's death in time to appear as claimants in the probate proceedings, had forwarded at the usual time the amount of an annual remittance which the decedent during his lifetime had been accustomed to send to a distant relative. This result at first glance astonishes the lawyer familiar with the long and for the most part, uniform line of adjudications of the extrinsic fraud rule in California.[2] Although the decision is justifiable on its facts, it admittedly points to a tendency towards liberality in the application of the doctrine as first laid down.[3]

A proper estimate of this doctrine involves an understanding of its place in the scheme of legal concepts.[4]

The place of the extrinsic fraud rule in legal theory is this: The maxim "Fraud is the arch enemy of equity" states the universal rule that equity will relieve against fraud wherever found. The one outstanding exception to this rule is crystallized in the extrinsic fraud doctrine—that equity will relieve against a judgment tinged with fraud only when the fraud was involved in the

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[14] It is to be noted that in the Gould case, supra, n. 9, the court was not called upon to dispose of the property as directed by section 146 of the Civil Code,—that matter having been arranged by mutual agreement. Since the interlocutory judgment merely confirmed this agreement, the court's decision can be reconciled with the code sections. Yet whenever the court assumes jurisdiction, and no appeal is taken, it is apparent that the interlocutory judgment disposing of the property becomes final at the expiration of six months. It follows that the better policy in all cases is to defer ultimate disposition to the final decree.

[1] (Sept. 1, 1920) 33 Cal. App. Dec. 75. Rehearing denied by supreme court Oct. 29, 1920. Two contemporaneous cases also present the question: Morgan v. Asher (Sept. 1, 1920) 33 Cal. App. Dec. 86; McGehee v. Curran (Sept. 1, 1920) 33 Cal. App. Dec. 95. Rehearings in each case denied by supreme court, Oct. 28 and Oct. 30, respectively (60 Cal. Dec. 529, 531).

[2] The authorities on the subject are legion. The scope of this note is a discussion of the theory and practice of the doctrine in the light of the California cases.

[3] Pico v. Cohn (1891) 91 Cal. 129, 25 Pac. 970, 27 id. 537, 25 Am. St. Rep. 159, 13 L. R. A. 336; also, State of California v. McGlynn (1862) 20 Cal. 233, 81 Am. Dec. 118; Case of Broderick's Will (1874) 88 U. S. (21 Wall.) 503, 22 L. Ed. 599, which involve probate decrees, (infra, n. 8, 9) are the leading cases in this state. The long list of authorities accord includes: Fealey v. Fealey (1894) 104 Cal. 354, 38 Pac. 49, 43 Am. St. Rep. 111; Steen v. March (1901) 132 Cal. 616, 64 Pac. 994; Del Campo v. Camarillo (1908) 154 Cal. 647, 98 Pac. 1049; Huffaker v. Gray (1918) 38 Cal. App. 605, 177 Pac. 183; People v. Mooney (1918) 178 Cal. 525, 174 Pac. 325.

[4] For the doctrine generally, see 2 Freeman on Judgments, §§ 486-489, 3 Story's Equity Jurisprudence, § 2044.